MARY GEORGE UNAZI v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
HARMINDAR SINGH DHALIWAL J
[CRIMINAL APPEAL NO: B-05-140-06-2015 (NGA)]
29 FEBRUARY 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Sections 39A(2) & 39B(1)(a) – Trafficking in 765.9g of methamphetamine – Conviction and sentence – Appeal against – Drugs found hidden in secret compartment of bag – Allegation that accused person brought bag for husband's friend – Whether defence probable – Whether accused person had knowledge of drugs – Non-calling of material witness – Whether adverse inference ought to be invoked – Evidence Act 1950, s. 114(g) – Whether conviction and sentence safe*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Drugs found hidden in secret compartment of bag – Accused person convicted for offence of trafficking drugs and sentenced to death – Allegation that accused person brought bag for husband's friend – Whether defence probable – Whether accused person had knowledge of drugs – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 39A(2) & 39B(1)(a)*

EVIDENCE: *Witness – Non-calling of witness – Drugs found hidden in secret compartment of bag – Accused person convicted for offence of trafficking drugs and sentenced to death – Allegation that accused person brought bag for husband's friend – Accused person gave phone number for police to contact – Phone number traced to certain address and led to discovery of man – Man not called to testify in court – Whether conviction and sentence safe – Whether adverse inference ought to be invoked – Evidence Act 1950, s. 114(g)*

The appellant was arrested at the arrival hall of the Kuala Lumpur International Airport. She had with her two bags, namely a trolley bag ('P17') and a sling bag. The appellant unlocked P17 using a key taken from her sling bag. Further inspection revealed two hidden compartments containing two packets of substances which were later confirmed by the chemist to be 765.9g of methamphetamine. The appellant immediately informed the police that her husband, who was studying in Malaysia, had invited her and asked her to bring a bag from his friend. The appellant gave her husband's number to the police. The police dialled the number and the appellant spoke to her husband, pretending to be on a taxi. She then asked her husband to speak to the police officer, pretending to be the taxi driver, and her husband gave the police his address. The police went to the address given and a man ('Kinzi') who the appellant did not know and was not her husband was arrested. The appellant was charged at the High Court for trafficking in drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Satisfied that the elements of possession and trafficking

had been made out, the appellant was called to enter defence. The appellant denied knowledge of the drugs and maintained that she was an innocent carrier. She reiterated the version that was given to the police when she was arrested. At the end of the defence case, the trial judge found the appellant guilty and convicted her for the offence. The appellant was sentenced to death. Hence, the present appeal against her conviction and sentence. The appellant submitted that, *inter alia*, (i) the element of knowledge had not been sufficiently proven under s. 37(d) of the DDA; and (ii) no investigation was done by the police to discover the link between the appellant's husband and Kinzi.

Held (allowing appeal)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The fact of concealment must not be considered in isolation but with all other evidence available. The trial judge failed to consider the evidence favourable to the appellant and had not sufficiently evaluated the defence case. The trial judge placed much reliance on the fact that it was unreasonable for the appellant's husband not to fetch the appellant at the airport and not to meet her when she arrived at the address given by her husband. Whilst it was reasonable to expect the husband to fetch the appellant at the airport and meet her at the said address, this was not the run of the mill case where an accused person threw a name and nothing more. (paras 28-30)

(2) The appellant had raised the issue of adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution for the non-calling of Kinzi. However, there was no consideration by the trial judge of s. 114(g). The non-calling of Kinzi had prejudiced the appellant. Had Kinzi been called as a witness, he would be able to answer these questions (i) did he intend to collect P17 from the appellant; (ii) how did he know the appellant was coming to the said address; and (iii) was there any connection between him and the appellant's husband. The fact that it was Kinzi and not the appellant's husband who came to meet the appellant lent credence to the defence version that P17 was brought by the appellant for her husband's friend. Kinzi and/or the appellant's husband could be the real traffickers. (paras 32-34)

(3) The defence could not be labelled as a mere denial. The appellant's version might not be the truth but the court was not concerned with whether the appellant was telling the truth but whether her version had raised a reasonable doubt on the prosecution's case. On the totality of the evidence, the appellant had succeeded in doing so. The conviction of the appellant on the charge of trafficking was not safe. The order of the High Court was set aside and substituted with an order of conviction for the offence of possession, punishable under s. 39A(2) of the DDA. The appellant was sentenced to 18 years imprisonment. (paras 34-36)

***Bahasa Malaysia** Headnotes*

Perayu ditangkap di balai ketibaan Lapangan Terbang Kuala Lumpur. Ketika itu, dia membawa dua beg iaitu beg troli ('P17') dan beg sandang. Perayu membuka P17 menggunakan kunci yang diambil dari beg sandangnya. Pemeriksaan lanjut mendedahkan dua bahagian tersembunyi berisi dua paket bahan yang kemudian disahkan oleh ahli kimia sebagai 765.9g methamphetamine. Perayu segera memberitahu pihak polis bahawa suaminya yang sedang belajar di Malaysia telah mengajaknya datang dan menyuruh perayu membawa sebuah beg kawannya. Perayu memberi nombor telefon suaminya kepada pihak polis. Pihak polis mendail nombor tersebut dan perayu bercakap dengan suaminya sambil berpura-pura berada di dalam teksi. Dia menyuruh suaminya bercakap dengan pegawai polis, yang berpura-pura sebagai pemandu teksi, dan suami perayu memberi alamatnya kepada pihak polis. Pihak polis pergi ke alamat yang diberi dan seorang lelaki ('Kinzi') yang tidak dikenali perayu dan bukan suaminya, ditahan. Perayu dihadapkan ke Mahkamah Tinggi kerana mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Berpuas hati bahawa elemen milikan dan pengedaran berjaya dibuktikan, perayu dipanggil membela diri. Perayu menafikan pengetahuan tentang dadah tersebut dan menyatakan dia cuma pembawa tidak bersalah. Dia mengulang semula versi yang dimaklumkan kepada pihak polis ketika dia ditahan. Perayu dijatuhkan hukuman mati. Maka timbul rayuan ini terhadap sabitan dan hukumannya. Perayu menghujahkan, antara lain, (i) elemen pengetahuan bawah s. 37(d) ADB tidak dibuktikan secukupnya; dan (ii) pihak polis tidak menjalankan siasatan tentang kaitan suami perayu dengan Kinzi.

Diputuskan (membenarkan rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Fakta penyembunyian tidak boleh dipertimbangkan berasingan daripada kesemua keterangan yang ada. Hakim bicara gagal mempertimbangkan keterangan yang berpihak pada perayu dan tidak menilai secukupnya kes pembelaan. Hakim bicara terlalu bergantung pada fakta bahawa tidak munasabah sekiranya suami perayu tidak menjemput perayu di lapangan terbang dan tidak berjumpa dengannya semasa dia tiba di alamat yang diberi oleh suaminya. Walaupun memang munasabah untuk menjangka si suami akan menjemput perayu di lapangan terbang dan berjumpa dengannya di alamat tersebut, ini bukan kes biasa dalam mana tertuduh suka-suka memberi nama dan tidak lebih.

(2) Perayu membangkitkan isu anggapan bertentangan bawah s. 114(g) Akta Keterangan 1950 terhadap kes pendakwaan atas kegagalan memanggil Kinzi. Walau bagaimanapun, hakim bicara tidak mempertimbangkan s. 114(g). Kegagalan memanggil Kinzi memprejudiskan perayu. Jika Kinzi dipanggil sebagai saksi, dia boleh menjawab soalan-soalan (i) adakah dia berniat mengambil P17 daripada perayu; (ii) bagaimana

A dia tahu perayu akan pergi ke alamat tersebut; dan (iii) sama ada terdapat hubungan antara suami perayu dengannya. Hakikat bahawa Kinzi dan bukan suami perayu yang datang bertemu dengan perayu menyokong versi pembelaan bahawa P17 dibawa oleh perayu untuk rakan suaminya. Kinzi dan/atau suami perayu mungkin pengedar sebenar.

B **(3)** Pembelaan tidak boleh dilabelkan sebagai penafian semata-mata. Versi perayu mungkin bukan kebenaran tetapi mahkamah tidak mementingkan sama ada perayu bercakap benar tetapi sama ada versinya membangkitkan keraguan munasabah terhadap kes pihak pendakwaan. Berdasarkan keseluruhan keterangan, perayu berjaya berbuat demikian.
C Sabitan perayu bagi pertuduhan mengedar dadah tidak selamat. Perintah Mahkamah Tinggi diketepikan dan diganti dengan perintah sabitan bagi kesalahan milikan yang boleh dihukum bawah s. 39A(2) ADB. Perayu dijatuhkan hukuman 18 tahun penjara.

D **Case(s) referred to:**
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Nachilongo Doreen (W/Zimbabwe) v. PP [2014] 1 LNS 24 CA ***(refd)***
PP v. Nolose Albert Raleshome [2014] 8 CLJ 689 FC ***(refd)***
Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***
E *Teh Hock Leong v. PP [2008] 4 CLJ 764 CA* ***(refd)***
Zulfikar v. Mustaffah v. PP [2001] SLR 633 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39A(2), 39B(1)(a), (2), First Schedule Evidence Act 1950, s. 114(g)

F *For the appellant - Sangeet Kaur Deo; M/s Karpal Singh & Co*
For the respondent - Aslinda Ahad; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-4-01-2012 (varied).]

G *Reported by Najib Tamby*

JUDGMENT

Tengku Maimun Tuan Mat JCA:

H **[1]** The appellant was charged in the High Court at Shah Alam for trafficking in dangerous drugs, *to wit* 765.9g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act), punishable under s. 39B(2) of the Act. The offence was said to have been committed at the Kuala Lumpur International Airport (KLIA) on 10 May 2011 at about 3.10pm. The appellant was found guilty as charged and was convicted and
I sentenced to death by the High Court.

[2] Aggrieved by the conviction and sentence, the appellant appealed to this court. We heard the appeal at the end of which we had set aside the order of the High Court. We substituted the conviction of the appellant with one of possession of the dangerous drugs under s. 39A(2) of the Act and we sentenced her to 18 years imprisonment. Our reasons now follow.

The Prosecution Case

[3] Briefly, the background facts of the case are as follows. The appellant was arrested at the KLIA on 10 May 2011 upon her arrival from Dubai. She had with her two bags, one of which was a brown trolley bag (exh. P17). The appellant was approached by L/Cpl Mohamad Rafi bin Lisut (SP3) and his team who had asked her to scan her bag. The appellant did so. Nothing incriminating was detected in bag P17.

[4] SP3 then instructed the appellant to follow him to the narcotics office of the KLIA. A body search on the appellant also revealed nothing incriminating.

[5] Further examination was conducted on the bag exh. P17 which had the name tag of the appellant. P17 was locked and the appellant took the key from her sling bag. Inside P17, SP3 found clothing, a Bible, CDs, toiletries and shoes.

[6] SP3 noticed that the sides of the bag were unusually thick. He opened the sides using a screwdriver and he discovered two panels. Upon removal of the panels, SP3 found two packets (exhs. P10 and P11) from the left and right side of the bag. The packets contained substance which SP3 suspected to be drugs. The appellant was arrested.

[7] Upon being arrested, the appellant informed the police that her husband who was studying in Malaysia had invited her and had asked her to bring a bag from his friend. The appellant gave her husband's phone number to the police. The police called the number. The appellant pretended to be in a taxi and asked her husband to speak to the taxi driver (who was a police officer) and gave the driver his address. The police went to the address given. At the said address, a man by the name of Kinzi was arrested. Kinzi was not the appellant's husband. The appellant did not know Kinzi.

[8] Upon analysis by the chemist, Norhayati binti Jaafar (SP2), the substance was confirmed to be methamphetamine, as listed in the First Schedule of the Act, weighing 765.9g.

Findings Of The Trial Judge At The End Of The Prosecution Case

[9] The learned trial judge held that the appellant had exclusive control of the bag exh. P17 and its contents. In so holding, the learned trial judge considered the following facts:

(i) that exh. P17 was carried by the appellant;

(ii) that exh. P17 had the name tag of the appellant;

(iii) that the appellant had the key to exh. P17; and

(iv) that the clothing found in the bag had the DNA of the appellant.

[10] From the manner that the drugs were concealed in the sides of the bag which was not visible to the naked eye, the learned trial judge made an inference that the appellant had knowledge of the drugs in exh. P17.

[11] Relying on the fact that the appellant travelled from Lagos to Malaysia, the learned trial judge invoked s. 2 of the Act to find that the element of trafficking had been proved by the prosecution.

[12] Having found that both the elements of possession and trafficking had been made out against the appellant, the learned trial judge called upon the appellant to enter her defence.

The Defence

[13] We do not propose to set out the defence in detail. Suffice to state that essentially, the defence of the appellant was one of innocent carrier. In her evidence given under oath, the appellant reiterated her version that was given to the police when she was arrested, namely that she came to Malaysia to visit her husband, George U King, who was studying in Malaysia. Her flight ticket was purchased by her husband who had told her to bring a bag from his friend. The bag was given by the husband's friend through her brother-in-law in Lagos. She had no knowledge of the drugs in the bag.

[14] At the end of the defence case, the learned trial judge found that the defence was a mere denial. The appellant was thus convicted and sentenced to death.

The Appeal

[15] Before us, the submission of learned counsel for the appellant revolved on the following issues:

(i) the finding of the learned trial judge on knowledge;

(ii) the failure of the prosecution to investigate the defence version and the failure to produce or offer Kinzi; and

(iii) the finding of the chemist.

[16] On the first issue, the complaint of learned counsel was that the learned trial judge had failed to consider evidence which was favourable to the appellant. In concluding that the appellant had knowledge of the drugs, the learned trial judge relied on the manner the drugs were concealed and on the conduct of the appellant, where according to SP3, the appellant appeared scared and suspicious.

[17] However, SP3 had also stated that the appellant remained calm throughout the examination and even when the police was tearing the sides of the bag, which learned counsel contended, was consistent with the fact that the appellant had no knowledge of the drugs.

[18] Learned counsel thus argued that the element of knowledge had not been sufficiently proven either by direct evidence or presumption under s. 37(d) of the Act at the *prima facie* case.

[19] On the second issue, learned counsel submitted that although the investigating officer, Inspector Mohd Firdaus bin Ali (SP4) knew that the appellant came to Malaysia to visit her husband and that his friend had given her the bag exh. P17, no further investigation was done by the police to discover the link between the appellant's husband and Kinzi. Learned counsel further submitted that Kinzi was a relevant witness to the defence. Kinzi could have supported the defence version.

[20] As regards the evidence of the chemist, learned counsel canvassed the issue that SP2 did not homogenise the substance before she conducted the chemical tests and that there was a discrepancy in the weight of the drugs as testified by SP2 and SP3.

[21] Learned counsel had also submitted that there was a delay on the part of SP4 in sending the drug exhibits to SP2. The appellant was arrested on 10 May 2011 while the drugs were sent on 6 December 2011. No explanation was given by SP4 as to why it took him seven months to send the drugs to SP2 for analysis.

Our Findings

[22] We will first deal with the third issue where the complaint of learned counsel was two-fold, one was in respect of homogenisation of the substance by SP2 and the other, on the break of the chain of evidence.

[23] The learned trial judge had made reference to the Federal Court judgments in *PP v. Nolose Albert Raleshome* [2014] 8 CLJ 689 on the issue of homogenisation and *Lew Wai Loon v. PP* [2014] 2 CLJ 649 on the discrepancy in the weight of the drugs.

[24] Based on the above authorities, we found that the learned trial judge did not err in his analysis of the issue when His Lordship stated:

> 11. Di dalam kes *Lee Wai Loon* di atas apa yang ditekankan ialah berkenaan rantaian pergerakan barang-barang kes, seandainya penandaan telah dibuat dan setiap pergerakan direkodkan dengan baik maka isu berkenaan perbezaan berat kasar dadah itu adalah tidak relevan, di held No. 2 diputuskan:
>
> > One fact and/or event to consider was whether there was any break in the handling or custody which tantamount to a break in the chain of evidence which, if occurred, should cast doubt in the exhibit as a reliable and trustworthy price of evidence.
>
> 12. Di atas alasan ini, saya berpendapat bahawa isu ini juga gagal.
>
> ...
>
> ...

A 26. Mengenai isu homogeny, saya berpendapat ianya adalah tidak relevan untuk dibincangkan lagi selepas kes *Nolose Albert Raleshome v. PP* [2014] MLJU 9, keputusan Mahkamah Rayuan, yang telah diketepikan oleh Mahkamah Persekutuan, bagaimanapun, saya percaya kes-kes terdahulu seperti kes *PP v. Lam San* [1991] 3 CLJ 2410 dan *Munuswamy v. PP* [1987] 1 MLJ 492 yang jelas memutuskan bahawa keterangan Ahli Kimia
B hendaklah diterima "on its face value", maka saya berpendapat isu berkaitan berat kasar dan homogeny adalah tidak relevan lagi. Saya juga berpuashati dan bersetuju dengan penemuan Ahli Kimia yang mengatakan dadah tersebut adalah Methamphetamine seberat 765.9 gram dan ia merupakan sejenis dadah berbahaya yang disenaraikan di bawah Jadual Pertama ADB, 1952.
C

[25] We agreed with the finding of the learned trial judge. We found from the evidence of SP3, SP2 and SP4 that they had made markings on the exhibits and they had identified their respective markings in court. We therefore, found that the third issue was devoid of any merit.

D **[26]** The first and the second issues may be dealt with together, as they were related to the complaint of learned counsel that the learned trial judge had failed to consider the evidence favourable to the defence in concluding that the appellant had knowledge of the drugs in exh. P17.

E **[27]** On the element of knowledge, we found that the learned trial judge was correct to consider the manner the drugs were concealed in making an inference that the appellant had knowledge of the said drugs. That approach has a legal basis (see for example *Zulfikar v. Mustaffah v. PP* [2001] SLR 633; *Teh Hock Leong v. PP* [2008] 4 CLJ 764; *Nachilongo Doreen (W/Zimbabwe) v. PP* [2014] 1 LNS 24; [2014] 2 MLJ 597).

F **[28]** Nonetheless, in our view, the fact of concealment must not be considered in isolation but with all other evidence available before the court. In this regard, we found merit in the complaint of learned counsel that the learned trial judge failed to consider the evidence favourable to the appellant and that the learned trial judge had not sufficiently evaluated the defence
G case.

[29] The core of the defence was that the appellant was an innocent carrier and that she brought the bag to Malaysia for her husband's friend. In rejecting the appellant's version that the bag exh. P17 was for her husband's friend, the learned trial judge had placed much reliance on the fact that it was
H unreasonable for the appellant's husband not to fetch the appellant at the airport and not to meet her when she arrived at the address given by the husband.

[30] Whilst it was reasonable to expect the husband to fetch the appellant
I at the airport and to meet her at the said address, we found that this is not the run of the mill case where an accused person threw a name and nothing more. In this case, the appellant had her husband's phone number. The appellant contacted her husband over the phone, pretended that she was in

a taxi and requested her husband to speak with the driver, to whom the husband had given an address. The so-called taxi driver was in fact, a police officer. Through the telephone conversation, the police managed to trace an address. And the police went to the said address where Kinzi was arrested.

[31] Learned DPP submitted that Kinzi had nothing to do with the drugs recovered from the appellant. With respect, we disagreed. The fact that Kinzi was arrested at the very address that the appellant was led to, raised the following questions: why did Kinzi come to meet the appellant? Did he intend to collect the bag exh. P17 from the appellant? How did Kinzi know the appellant was coming to the said address? Was there any connection between the appellant's husband and Kinzi?

[32] Had Kinzi been called as a witness, he would be able to answer the above questions. Although it was the prerogative of the prosecution to call witnesses, on the facts and circumstances of this appeal, we were of the view that the non-calling of Kinzi had prejudiced the appellant. And in the absence of Kinzi, those questions ought to be resolved in favour of the appellant, particularly when the appellant's husband and Kinzi were not fictitious characters. Their existence was confirmed by SP4 when he testified as follows in cross-examination:

S: Suami telah beritahu alamat beliau untuk hantar OKT dan pihak polis telah pergi ke alamat itu?

J: Saya tahu.

S: Setelah polis sampai di alamat ini, polis suruh suami turun tapi (1) (L)

Nigeria ditangkap bernama 'Kinzi'?

J: Setuju.

OKT kata Kinzi bukan suami dia, jadi dia dilepaskan.

S: Keterangan OKT adalah penting untuk disiasat?

J: Ya.

S: Dari awal beliau katakan beliau tak tahu tentang kehadiran dadah, beg diberikan oleh kawan suami dia?

J: Ya.

[33] Before the learned trial judge, the defence had raised the issue of adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution for the non-calling of Kinzi. There was, however, no consideration by the learned trial judge of s. 114(g) and the aspects of Kinzi as adverted to in para. 31 above. It is trite that a trial judge had a duty to consider all the evidence adduced before him and to fairly and justly weigh the defence version (see *Prasit Punyang v. PP* [2014] 7 CLJ 392; [2014] 4 MLJ 282).

[34] The fact that it was Kinzi and not the appellant's husband who came to meet the appellant, in our view lent credence to the defence version that the bag exh. P17 was brought by the appellant for her husband's friend. Kinzi and/or the appellant's husband could be the real traffickers. The defence, in the circumstances, could not be labelled as a mere denial.

[35] The appellant's version may not be the truth but the court is not concerned with whether the appellant was telling the truth but whether her version had raised a reasonable doubt on the prosecution case (see *Mat v. PP* [1963] 1 LNS 82; [1963] 29 MLJ 263). On the totality of the evidence, we found that the appellant had succeeded in doing so.

Conclusion

[36] Given the facts and circumstances of this case, we were unanimous in our view that the conviction of the appellant on the charge of trafficking was unsafe. We therefore unanimously allowed the appeal. We set aside the order of the High Court and we substituted with an order of conviction for the offence of possession, punishable under s. 39A(2) of the Act. Having considered the mitigating factors and the submission of learned DPP, we sentenced the appellant to 18 years imprisonment with effect from the date of arrest.